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Should States Be Allowed to Deny Parents Religious Options in School Choice Programs

By Michael Bindas and Walter Womack
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In the wake of the Civil War, the federal government financed education at religious schools, which were eager to provide desperately needed opportunity to the newly liberated slaves — opportunity that few other schools were willing to provide at the time.

Today, religious schools provide similar opportunity to the descendants of those formerly enslaved people, educating tens of thousands of Black students through “school choice” programs. Those programs provide public funds to parents to choose schools, religious or nonreligious, that will best serve their children.

In 2002, the Supreme Court [held](#) that the Constitution allows school choice programs to include schools that provide religious instruction, so long as the voucher program also offers secular options. The question now before the court is whether a state may nevertheless exclude schools that provide religious instruction.

The case, [Carson v. Makin](#), which the justices will hear Wednesday, concerns Maine’s tuition assistance program. In that large and sparsely populated state, over half of the school districts have no public high schools. If a student lives in such a district, and it does not contract with another high school to educate its students, then the district must pay tuition for the student to attend the school of her or his parents’ choice. That school may be public or private, inside or outside the state — even outside the country.

It can even be a religious-affiliated school. But one type of school is off limits: a school that provides religious instruction. That may seem unconstitutional, and we argue that it is. Only last year, the Supreme Court, citing the free exercise clause of the Constitution, [held](#) that states cannot bar students in a school choice program from selecting religious schools when it allows them to choose other private schools.

But in what can best be described as a hairsplitting distinction, Maine sees things differently. The state insists that it does not bar parents from choosing certain schools because they are religious, but rather because the schools do religious things.

The constitutional significance of any such distinction was not resolved by the court last year. So now the justices are being asked by two families who have been forced to choose between their right to tuition assistance and their desire for a religious education whether Maine's exclusion is constitutional. Those families are clients of the Institute for Justice, where one of us works. They argue that their rights to exercise their religion are being violated. (Maine, for its part, says the Constitution does not require states to use public funds to pay for a religious private education, even if they pay for a secular private education.)

The outcome will be enormously consequential for families in public schools that are failing them and will go a long way toward determining whether the most disadvantaged families can exercise the same control over the education of their children as wealthier citizens.

Religious schools and educators have long and nobly served our nation's most disadvantaged students. A ruling in Maine's favor would overlook the critical contributions that religious schools have made to the lives of Black Americans for more than 150 years.

Before the Civil War, many Southern states [had anti-literacy laws](#) intended to keep the enslaved population in not only physical, but also mental, captivity. These laws were passed in response to the activities of Black preachers such as Nat Turner and Denmark Vesey, who preached a message of liberation rooted squarely in the Bible. Fearful that their message might spread, Southern legislatures made it a crime to teach slaves to read — even to read the Bible.

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At the end of the war, the Union government faced the challenge of helping set the freedmen on their way to self-determination. This was no small task, however, given that at most only [about 10 percent](#) of the liberated population was literate.

To tackle this challenge, the federal government, through the [Freedmen's Bureau](#), partnered with Northern organizations to establish schools for the newly liberated in the South. The bureau provided financial assistance to facilitate these educational efforts, and most schools were [established](#) by Northern missionary societies. These religious educators fervently desired to help the freedmen deliver themselves from bondage through academic and spiritual support.

The work of those educators has had a lasting impact on the Black community.

But even the heroic efforts of these educators could not fully meet the daunting challenge of ensuring that Black children had access to the same educational opportunity as their white brothers and sisters. In cities and rural communities across the country, Black students have for decades been failed by a public school system that assigns children to schools by ZIP code (read: by wealth), rather than the actual needs of the child.

From a policy perspective, opponents of school choice complain that it diverts taxpayer dollars from public schools so that some students can receive a religious education, and that it further weakens already struggling public schools.

But the fact is that students whose families are not rich enough to move to another school district or to pay tuition at a private school are trapped in their assigned public school — no matter how bad, no matter how segregated.

Yet, as in the post-bellum South, there are religious schools ready to help meet the educational and spiritual needs of these children. And in many parts of the country, government is empowering parents to select such schools. The federal government, for example, funds the Opportunity Scholarship Program for low-income families in the District of Columbia. A large majority of students who receive aid under the program are Black, and a large majority of the schools they select are religious. Similar programs are providing opportunity for children in Cleveland, Milwaukee, New Orleans and other cities.

Given the historical commitment of religious schools to the Black community, as well as the failure of so many public schools to meet the needs of that community, it is no wonder that educational choice is so popular among Black parents. Recent [polling](#) shows that approximately three-quarters of Black Americans favor parental choice in education.

Yet if Maine has its way in *Carson v. Makin*, states will have the constitutional ability to bar parents seeking to use school choice programs from selecting religious schools that provide religious instruction — in short, to discriminate against parents who want a school that provides both academic and spiritual nourishment.

If Maine gets that power, the freedmen will be rolling in their graves.

[Michael Bindas](#) is a senior attorney at the libertarian Institute for Justice. Walter Womack is the pastor of Faithful Baptist Church and president of the Memphis chapter of the Southern Christian Leadership Conference, which submitted [a brief](#) to the Supreme Court in support of the parents in this case.